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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-177

CLARE DODGE CHILDERS, ET AL, *Petitioners*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit
AND APPENDICES

W. JAMES KRONZER, JR.
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002
Attorney for Petitioners

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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To The Honorable Supreme Court Of The United States:

Clare Dodge Childers, and her children, Barbara Clare Childers and Patti Christine Childers, the surviving statutory beneficiaries of Hal G. Childers, join with the First City National Bank of Houston, the co-executor with Clare Dodge Childers of the Estate of Hal G. Childers, and respectfully petition the Court to grant a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, and to thereafter reverse the cause and remand it for trial on the merits.

Opinions Below

1) The Memorandum Opinion of the District Court is reported in volume 316 Federal Supplement, beginning at page 539, and appears as Appendix "A" in the Appendices. The Order of July 16, 1970 is included.

2) The Opinion of the Court of Appeals is not yet reported, but appears as Appendix "B" in the Appendices.

Statement of Jurisdiction

Petitioners seek to review the Opinion and Judgment (see Appendix "C") of the Court of Appeals, under date of May 10, 1971, and no motion for rehearing was urged. Statutory jurisdiction is conferred under Title 28 U.S.C.A. §1254.

Questions Presented

1) Whether notice of the final denial of an administrative claim presented to the Federal Aviation Agency forwarded by certified mail to an attorney is imputable to the "claimants" so as to require the dismissal of the claim when filed in a United States District Court within two years after the claims accrued because of the language of 28 C.F.R. Part 14.9(a) reading in pertinent part as follows:

> "(a) Final denial of an *administrative claim* shall be in writing and *sent to the claimant,* his attorney, or legal representative by certified or registered mail. * * *."

2) Whether, because of the express provisions of Title 28 U.S.C.A. §2672, or because of inherent powers, the Attorney General or the Agency were empowered to

promulgate a rule or regulation (28 C.F.R. Part 14.9 (a)) eliminating the necessity of giving notice of final denial directly to the claimants.

3) Whether, under the circumstances of this case, the mailing by certified mail of a denial of an administrative claim to a deceased attorney in care of his former but dissolved (by his death) law firm is imputable to Petitioners so as to bar their claims under the Federal Tort Claims Act filed within two years from the date the cause of action accrued because of the provisions of Title 28 U.S.C.A. §2401(b) reading:

> "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency *within two years after such claim accrues*[1] or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

Statutes and Regulations Involved

1) Under the first questions presented 28 C.F.R. Part 14.9(a), reading as follows:

> "Chapter I—Department of Justice
>
> 14.9 Final denial of claim.
>
> (a) Final denial of an administrative claim shall be in writing and *sent to the claimant, his attorney, or legal representative* by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification."

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1. Unless otherwise indicated, all emphasis and ellipsis has been supplied by the undersigned.

2) Under the second group of questions presented, in addition to 28 C.F.R. Part 14.9(a), the following statutes:

28 U.S.C.A. §2401(b) [set forth in the third group of questions, infra]

28 U.S.C.A. §2675(a), reading:

"Disposition by federal agency as prerequisites; evidence

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *unless the claimant* shall have first presented the claim to the appropriate Federal agency and *his claim shall have been been finally denied* by the agency in writing and *sent by certified or registered mail.* The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. * * *."

28 U.S.C.A. §2672, reading:

"Administrative adjustment of claims

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred:

Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee."

3) Under the third group of questions presented:

28 U.S.C.A. §2401(b) [set forth in "third question" presented, supra]

Articles 6132b, Rev. Civ. Stats. of Texas, §§30, 33, 35 (see Appendix "D")

Statement of the Case

On December 19, 1967, Hal G. Childers was fatally injured when the rented aircraft he was flying crashed near Manvel, Texas due to the alleged failure of certain equipment and the alleged negligence of employees of the Federal Aviation Agency with respect to the manner of handling Childers after the Agency employees learned of his difficulties under the adverse weather conditions then prevailing. The Childers Petitioners are his statutory beneficiaries.

On July 23, 1968, an administrative claim predicated upon the Federal Tort Claims Act was filed with the FAA by Robert L. Steely, Esq., now deceased, but then a partner in the law firm of Brown, Kronzer, Abraham, Watkins and Steely. It was prepared on forms furnished by the required counsel for the agency, and no one questions but that the claim, as prepared, was in full compliance with all appropriate regulations. (See Appendix "E", being a copy of the "claim".) It provided the name and address of the "claimants".

Subsequent to the filing of the claim the agency requested of Mr. Steely:

> "We also require evidence of *the authority of Mrs. Hal G. Childers* to present the claim."

Non-responsively, at least insofar as his representation was concerned,[2] on August 29, 1968, Steely responded and said:

> "You have spoken of evidence of the *authority of Mrs. Hal G. Childers to present the claim,* and we present the original of a 'Statement of Authority' signed by Mrs. Hal G. Childers." (R. 43)

The "Statement of Authority" (Appendix "F") did set forth her capacity to assert the "claims", and, by way of surplusage, informed the agency of her employment of counsel. No waiver of "notice" of denial by Mrs. Childers was sought by the agency nor given by the "claimants".

In any event, at all times, and in all correspondence passing between the agency and counsel, only Mr. Steely handled the claim from the lawyers standpoint, and this was known and recognized by the agency. *All* correspondence from the agency was directed to Steely, and, in effect, in care of his firm.[3] The agency's Regional counsel,

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2. The Court of Appeals erroneously treated this "Statement of Authority" as encompassing a requirement that Steely also demonstrate his authority to represent the Childers family. (See Appendix "B", pages 2 and 3)

3. The Court of Appeals mistakenly suggests the "denial letter" was "addressed to both Mr. Steely and the firm." (Appendix "B", page 4) This simply is not so, nor did the government so contend in the early going. (See the Motion to Dismiss and the Reply to Petitioners' Response in the District Court.) This improper inference is drawn for the purpose of supporting the unsound conclusion that the "Statement of Authority" expressly authorized the forwarding of the denial to counsel *to the exclusion of the "claimant."*

The suggestion is further belied by reference to the "denial letter" itself, expressly prefacing the contents to "Dear Mr. Steely." (Appendix "G") *All* agency correspondence was similarly directed.

Hays Hettinger, was also served with a copy of the original "claim" (Appendix "H"), and presumably was and has at all times been kept fully informed of the status of the controversy (See Appendix "I"), including Mr. Steely's untimely death on February 6, 1969.[4]

On February 18, 1969, during the turmoil following his death, the agency "sent" its "denial letter" (Appendix "G") to the decedent, Robert L. Steely, and unbeknownst to any of the lawyers in his former firm, it was receipted for by a receptionist, and in some totally unknown and inexplicable manner forced its way into a voluminous manual that Steely had, during his lifetime, placed in the "Investigation" file. Because of this bizarre location, Mr. Watkins, the attorney to whom the case was ultimately assigned for further processing[5] with the consent of the "claimants", was unable to locate the office copy for nearly two days after the Motion to Dismiss was received.

As Mr. Watkins was unaware of the "final denial" letter out of caution he prepared and filed a Complaint before the expiration of two years from the accident, utilizing the second sentences of 28 U.S.C.A. §2675 (a) as a basis for this action. Thereafter, Respondent moved to Dismiss or for Summary Judgment based upon the failure to have filed the judicial proceeding within six months after the "denial letter" had been mailed to the primary attention of the decedent Steely. The Motion was

4. The government has never denied that Hettinger was aware of Steely's death, or that the Steely crash was not being investigated at the time the "denial letter" was forwarded. In fact, in oral argument before the Court of Appeals it was conceded that Hettinger was probably aware of the death.

5. Mr. Watkins was in California attending a funeral when the letter was apparently received by the receipting receptionist.

sustained, and the order of dismissal was affirmed by the Court of Appeals notwithstanding its observations that:

> "We agree that equitable considerations[6] here weigh heavily in favor of the plaintiff and her attorneys, * * *"
> (Appendix "B", page 8)

The Court of Appeals then proceeded to apply every conceivable technical and inequitable ground to uphold the dismissal of a timely instituted cause!

Reasons for Granting the Writ

1) Is notice of "final denial"[7] sent to the Claimant's "Attorney" imputable to the Claimant?

The parties have not disagreed that construing §2401 (b) together with §2675(a), which Petitioners say must be done, *McDonald v. Thompson,* 305 U.S. 263, 59 S.Ct. 176, 178 (1938), the Congress contemplated receipt of notice of "final denial" by the "claimant". §2401(b) makes no mention of the person or agency to whom the "notice" is to be sent, but §2675(a) does! It provides that,

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6. The government originally argued "Plaintiffs have alleged no legal, logical, or *equitable* reason * * *." (See page 3 of the Memorandum of Authority)

7. In the District Court the government contended that receipt of the "notice" was not necessary in view of the language of §2401 (b) that the "claim * * * shall be * * * barred * * * unless action is begun within six months *after the date of mailing,* * * *." In other words, the claim could be barred even though never received by any person interested in the claim. The Court of Appeals considered it unnecessary to pass on this extended assertion (Appendix "B", page 6), nor does it have substance. The companion statute, 28 U.S.C.A. §2675(a), and the regulations upon which the Defendant so heavily relies, 28 C.F.R. Part 14.9(a), expressly require that the notice be "sent to the claimant." *Cf. United States v. Walker,* 416 (5 Cir. 1935).

> "An action *shall not be instituted*[8] upon a claim * * * unless *the claimant shall have first presented*[9] the claim * * * and HIS CLAIM SHALL HAVE BEEN FINALLY DENIED * * * in writing and SENT by certified or registered mail. * * *"

The statute leaves no room for argument regarding its meaning or the legislative intent; it is that the *claimant* is the person to receive such an important document as one which establishes the jurisdiction of the courts!

As previously noted, the government so recognized in the early stages, but it argued:

> *"The Plaintiffs first three propositions mistakenly look exclusively to Sections 2401(b) and 2675 of Title 28, United States Code for the law governing the procedures for sending notice of final denial.* Plaintiffs have overlooked the controlling regulations entitled Administrative Claims Under Federal Tort Claims Act. Such regulations have the force and effect of law if made by a Department of the Government, and are addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such Department

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8. It is this statute, and this language, that reflects the Congressional intent to deal differently with the jurisdiction of the courts than with regulations relating to the processing of the claim at the administrative level.

9. This precise language also explains the reason for the request upon Mrs. Childers to furnish her "Statement of Authority." We again emphasize that the agency did not inquire as to Steely's authority, nor did the claimants waive any right to receive "notice" of "final denial." The "claim form" (Appendix "E") does not even provide a place for the attorney's name or residence, and the agency never requested that he demonstrate his authority or that the claimants designated him or his firm to be the persons to receive the "final denial."

> and are not in conflict with the express statutory provisions. (citing cases)"
>
> (See page 2 of the Government's "Memorandum of Authorities in Response to Plaintiff's Reply to Defendant's Motion to Dismiss.")

Because of the principle that the Court will avoid the striking down of legislative enactments or appropriate regulations, if possible, we first approach the question of notice under the Regulation promulgated by the Department of Justice, saving out attack upon the Regulation itself until a later juncture.

28 C.F.R. Part 14.9(a) provides in pertinent part:

> "Final denial of an administrative claim shall be in writing and *sent to the claimant,* his attorney, *or* legal representative * * *."

Construing this regulation with the statute to which it must necessarily relate (28 U.S.C.A. §2675(a)), or grammatically, or reasonably so as to avoid forfeiture of a timely filed claim, notice of "final denial" must be "sent to the claimant" and notice alone to an attorney is simply not sufficient to impute notice to the "claimant" not otherwise cognizant of the action.

Bearing in mind that §2675(a) contemplates notice may only be sent to the claimant, the only reasonable construction of the regulations is that additional persons were enumerated to insure receipt of this important notice by the claimant! That this was intended by the Department of Justice is further borne out by a grammatic construction of the regulation and an analysis of the only

statutory authority granting the power to make regulations relating to the processing of Federal Tort claims.

If the regulation had employed the conjunction "and" immediately preceding the phrase "legal representative", instead of the disjunctive word "or", there could be no question but that notice would have to be sent to both the claimant and the attorney, as well as the "legal representative" if one had been appointed. In cases where a legal representative is appointed,[10] under the language of this regulation notice to him would be sufficient, and properly so because he is, in legal contemplation, the claimant, and has, vicariously become the true party in interest. This result is reached because of the comma appearing before the phrase "*or* legal representative", which makes that phrase have adjectival reference to both the claimant and his attorney. However, the disjunctive "or", following as it does the comma, may not be interpolated into the regulation so as to require a reading that,

> "Final denial * * * shall be * * * sent to the claimant, *or* his attorney, or legal representative, * * *".

This is simply not a permissible interpolation so as to destroy the right of the claimant to receive notice as required by §2675(a)![11]

Petitioners' contention is further supported by reference to the only claimed statutory support the promulgation of the subject regulation. Part 14 of 28 Code of Federal Regulations, entitled "*Administrative Claims Under*

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10. Both Mrs. Childers and the bank were legal representatives, and neither were circulated with "notice."

11. For some unexplainable reason the Court of Appeals did not expressly discuss this threshold question.

Federal Tort Claims Act", designates the only authority for 14.9 and the regulations to be:

> "Authority: The provisions of this Part 14 issued under sec. 1, 80 Stat. 306; 28 U.S.C. 2672."

The applicable provisions of §2672 are:

> "Administrative adjustment of claims
>
> "The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or ommission occurred: *Provided,* That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee."

This enactment may be searched in vain for authority that would permit the Attorney General to promulgate a rule that would bar a claim after it has been administratively disposed of by transposing the notice requirements of 28 U.S.C.A. § 2675(a) from the claimant to the attorney.

The very least Petitioners could have hoped for and expected was a judicial interpretation that reconciled the regulation (28 C.F.R. Part 14.9(a)) with the statute (§2675(a))!

2) If 28 C.F.R. Part. 14.9(a) does provide that notice of "final denial" may be effectively sent to the claimant's counsel, and not to the claimant, is the regulation a valid exercise of administrative power?

Respondent argues, as previously noted, that (1) the regulation does substitute notice to the attorney, and thus permit the imputation of notice of denial to the claimant, and (2) it was a valid exercise of administrative power. Petitioners say if it accomplished the former, it ran afoul the rule prohibiting administrative rules or regulations that constitute amendments or additions to legislative enactments. Respondents have not disputed that 28 U.S.C.A. §2675(a) contemplates receipt *by the claimant*, and no other person is there designated to receive that significant document.

The Court of Appeals disposed of this contention in this manner:

> "This regulation is *not in conflict* with the Act nor any other regulation. It names explicitly the attorney as one of the people to whom the denial may be mailed. Furthermore, in *Claremont*,[12] *supra*, the denial that began the six months limitation period was mailed to the claimant's attorneys."

We respectfully disagree! Section 2675(a) expressly provides that notice be sent to the claimant, and makes no mention of imputative notice to attorneys, and if the

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12. The referenced decision is *Claremont Aircraft, Inc. v. United States of America*, 420 F.2d 896 (9 Cir. 1970), but that opinion may be searched in vain for any discussion of the subject regulation or any contention that notice to counsel was insufficient. This is the "equitable" grist employed by the Court of Appeals to reach such an incredibly unfair result.

Court of Appeals and Respondent are correct that such substituted notice effectively bars the unknowing claimant, there is a direct and positive conflict. Moreover, and we deem it to be of great significance, the quoted remarks of the Court of Appeals were not made in reference to section 2675(a) at all, same being the controlling statute, but only in reference to section 2401(b) which plainly has nothing to do with the person to whom the notice is to be directed! Of course the regulation does not "conflict" with §2401(b)! In fact, the Court of Appeals never mentioned or considered the controlling language of Section 2675(a) for rather obvious reasons.

Nor, under the applicable authorities, is it necessary to demonstrate that the regulation "conflicts" with the statute, it being sufficient to show that the regulation amends the statute or is an excess of administrative authority. The subject regulation, if interpreted as contended for by the Government, fails on both grounds. In *United States v: Two Hundred Barrels of Whiskey,* 95 U.S. 571, 576, 24 L.Ed. 491 (1877) a leading case on the subject, the Court said this with respect to an Internal Revenue Department regulation:

> "The rules and regulations which the Commissioner of Internal Revenue is authorized by section 2 to prescribe cannot have the effect of bringing the case under the operation of the penalty provided in section 96, if it was already covered by section 57. *The regulations of the Department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions.*"

Subsequently, in *International Ry. Co. v. Davidson,* 257 U.S. 506, 42 S.Ct. 179, 182 (1922) the Court amplified

on the principle with particular reference to the power of an agency to independently (of statute) promulgate rules and regulations, stating:

> "It is also insisted that the Secretary of the Treasury has authority, *independently of the power specially conferred by the act* of 1911 as amended, to issue the instruction complained of. The contention is that his instruction to the collector was not to compel the bridge company to pay the cost of the inspection service but merely to withdraw the service unless the company would agree to pay the cost; that since customs officials cannot be maintained at every point where merchandise may conceivably enter from contiguous countries, discretion must rest in the Secretary to determine whether the character and extent of the movement at a particular place justifies maintaining them there; and that the instruction given was a regulation under section 161 of the Revised Statutes (Comp. St. § 235), which had the force of law. Haas v. Henkel, 216 U.S. 462, 480, 30 Sup. Ct. 249, 54 L.Ed. 569, 17 Ann. Cas. 1112. To this contention it is perhaps a sufficient answer to say that the instruction given was obviously not a determination by the Secretary that the travel over these bridges on Sundays and holidays was not such as to justify the government in maintaining the inspection service. The travel was heavier on those days than on any other; and the service had been maintained continuously for more than 20 years. But there are other conclusive answers. Section 161 does not confer upon the Secretary any legislative power. Morrill v. Jones, 106 U.S. 466, 1 Sup. Ct. 423, 27 L.Ed. 267; United States v. George, 228 U.S. 14, 33 Sup. Ct. 412, 57 L. Ed. 712. *A regulation to be valid must be reasonable and must be consistent with law. The instruction given lacks both of these essentials.*"

A "regulation" that substitutes an attorney for the claimant as the party entitled to receive notice is neither reasonable, considered in the context of barring the institution of suit after exhausting the administrative remedies, and certainly is not consistent with the statute it is supposed to amend or modify.

Again, in dealing with the alleged or inherent power of a regulatory agency to provide for additional or clarifying rules said to bring definiteness into a general statute, this Court speaking through Justice Brandeis, said in *Campbell v. W.H. Long & Co.*, 281 U.S. 599, 50 S.Ct. 412, 415 (1930):

> "Third. Finally, the government contends that even if Congress did not provide for the termination on some definite date of permits issued under section 4, *it left the matter continuously open to control by regulations to be issued from time to time;* that sections 5 and 9 are not limitations upon this quasi-legislative police power; that the express provisions of the permits cannot have the effect of bargaining away such later exercise of that power as may be deemed appropriate; *and that the regulation of October* 1, 1927, *is a valid exercise of that power.* This contention, also, is unsound.
>
> The limits of the power to issue regulations are well settled. International Ry. Co. v. Davidson, 257 U.S. 506, 514, 42 S. Ct. 179, 66 L.Ed. 341. *They may not extend a statute or modify its provisions.* The regulation of October 1, 1927, purports to revoke unexpired permits as of December 31, 1928, without resort to the proceedings prescribed by sections 5 and 9. It thus attempts to deprive permittees of rights secured to them by these sections of the act. As was said in Higgins v. Foster (C.C.A.) 12 F.(2d) 646,

> 648: "We cannot see that the Commissioner under the guise of legislation, may do in gross what he had no power to do in detail." Whether or not the power to make regulations or the provision in section 6, authorizes the Bureau to fix expiration dates for permits when issued, it does not authorize the revocation of existing permits in violation of the express provisions of the act."

Who can gainsay that Respondent's interpretation does "not extend a statute or modify its provisions"?

Not only is the regulation invalid—so interpreted—for the reasons set forth in the foregoing decisions, but the limitations on the exercise of administrative power found in the only statutory source (28 U.S.C.A. § 2672) further vitiate Respondent's position. This limitation was discussed in *Miller v. United States,* 294 U.S. 435, 55 S.Ct. 440, 442 (1935), as follows:

> "It is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the act. It is not, in the sense of the statute, a regulation at all, but legislation. The effect of the statute in force at the time of the adoption of the so-called regulation is that *in respect of compensation allowances,* loss of a hand and an eye shall be deemed total permanent disability as a matter of law. There being no such provision with respect to cases of insurance, the question whether a loss of that character or any other specific disability constitutes total permanent disability is left to be determined as matter of fact. The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is

> beyond administrative power. *The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it.* United States v. 200 Barrels of Whiskey, 95 U.S. 571, 576, 24 L.Ed. 491; Morrill v. Jones, 106 U.S. 466, 467, 1 S.Ct. 423, 27 L.Ed. 267; United States v. Grimaud, 220 U.S. 506, 517, 31 S.Ct. 480, 55 L.Ed. 563; Campbell v. Galeno Chemical Co., 281 U.S. 599, 610, 50 S.Ct. 412, 74 L.Ed. 1063."

The only authority conferred upon the Attorney General or the Agency pursuant to 28 U.S.C.A. §2672 was for the purpose of administratively handling claims presented to the Agency, and not to generate rules governing the institution of suits or the jurisdiction of the District Courts.

Nor is there anything contrary to be found in any of Respondent's authorities. The Government's primary authority, *Maryland Casualty Co. v. United States,* 251 U.S. 342, 349, 40 S.Ct. 155, 157-8 (1920), correctly announces these principles to be:

> "In this the Court of Claims fell into error. It is settled by many recent decisions of this court that a regulation by a department of government, *addressed to and reasonably adapted to the enforcement of an act of Congress,* the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision."

Not only is the regulation not reasonably adapted to the enforcement of an act of Congress, if interpreted in the manner contended by Respondent, but it manifests a clear abuse of delegated authority by the Attorney General under such circumstances. Where in Section 2672 may

there be found authority to preempt the jurisdiction of the courts by regulation, or how may it be said substituted imputative service on an attorney is "reasonably adapted" to the enforcement of the Federal Tort Claims Act against an unknowing and unsuspecting claimant formerly represented by a deceased attorney?

3) Assuming the validity and general applicability of the subject regulation, did the death of Steely destroy the imputation of notice of final denial of the administrative claim to Petitioners.

The death of Steely raises two arguments urged by Petitioners in avoidance of the bar. They are that

A) notice to counsel is ineffective if counsel has expired, and

B) death of counsel terminates the attorney-client relationship so that notice, even to the decedent's firm, would not be imputable.

The Court of Appeals avoided (A) by suggesting that Steely's "firm" was "counsel of record" and, therefore, the listing of the firm name on the "denial" letter imputed the notice, and side-stepped (B) because of the provisions of the Uniform Partnership Act relating to "dissolution".

These distinguishing efforts will be discussed *seriatim.*

A. *Since Steely was solely responsible for administratively handling the claim, and indisputably the only lawyer that had anything to do with the processing of it, notice to him or his former firm is ineffective to impute notice to the claimants.*

The general rule is that statutory notices, to be effective, must carefully track the statute. 66 C.J.S. 2d §18, page 603. It is there stated:

> "Generally speaking, a person relying on the service of a notice by mail must show a *strict compliance* with the requirements of the statute."

Consistent with this text authority, this Court held in *Tripp v. Santa Rosa Street Rd. Co.*, 144 U.S. 126, 12 S.Ct. 655, 656 (1892) that,

> "Assuming the sufficiency of the affidavit, and that it established what would be a proper service under the laws of California, (Cal. Code Civil Proc. §§ 1012, 1013; 3 Deering Codes & St. 416.) in respect of which we express no opinion, the question presents itself whether such a service of citation to this court can be sustained. The statute provides that 'the adverse party shall have at least thirty days' notice.' (Rev. St. § 999;) and the citation is a summons to bring him in, which, under the subdivision 5 of rule 8, must be served before the return day. Service may be had upon his attorney or counsel with like effect as upon the party himself, but, when counsel of record is dead, it cannot be served on his personal representative, *nor even on his partner, if not regularly appearing on the record as counsel in the cause.*"

The Court of Appeals sought to distinguish this case upon the spumous ground that Steely's firm "was * * * counsel of record" by reason of the "Statement of Authority" previously mentioned, plus the fact that he would sign corespondence to the Agency "For the firm". This struthious and illiberal interpretation of this Court's holding is violative of the general rule that "a person relying on the service of a notice by mail must show a *strict compliance* with the statute."

We are not bold enough to suggest that when this Court used the phrase "counsel of record" in the *Tripp*

case it meant a partner actively participating in the proceeding, and not merely a lawyer or firm mentioned nonresponsively in a document filed in an administrative proceeding.

The *Tripp* case was followed by the Court of Customs and Patent Appeals in *United States v. Klytia Corp.*, 121 F.2d 473, 479, 480 (1941). In that case the corporate client was represented by one Carl W. Stern, and his business address appeared of record. In fact, *the record in the proceeding named the corporation and suggested that mailings affecting the corporation should be addressed to the attorney.* He expired prior to the date of the judgment in the lower tribunal, but his name was not removed from the record, and service of the appeal was sought to be perfected upon this deceased attorney. The applicable rule of procedure expressly authorized service of a client upon an attorney. (121 F.2d at page 478) Nonetheless, in holding that service upon the deceased attorney did not effectuate service upon the client, the Court of Customs and Patent Appeals held:

> "It is elementary law that the death of an attorney engaged by a client terminates a mere contract of employment.
>
> "In the case of Tripp v. Santa Rosa Street Railroad Company, 144 U.S. 126, 12 S.Ct. 655, 656, 36 L.Ed. 371, the court said: '* * * Service may be had upon his attorney or counsel with like effect as upon the party himself, but, when counsel of record is dead, it cannot be served on his personal representative, *nor even on his partner, if not regularly appearing on the record as counsel in the cause.* * * *'
>
> "See, also, Bacon et al. v. Hart, 1 Black 38, 66 U.S. 28, 17 L.Ed. 52, where it was held that service

> of a citation upon the executrix of the deceased counsel did not constitute service thereof upon the party or his counsel.
>
> "We are therefore constrained to hold that there has been no service of the petition for appeal or assignment of errors upon appellee or upon its attorney or agent."

In the Court of Appeals Respondent also urged that these cases could not be utilized because the fact of death was known to the serving party. Not only does that argument not appear as a basis for distinctions in the *Tripp* and *Klytia* cases, but the Court of Appeals made no mention of the assertion, undoubtedly due to the knowledge of Regional Counsel.

It is submitted the Court of Appeals improperly distinguished *Tripp* on the ground that Steely's firm *regularly appeared* on the record *as counsel in the cause."*

B. *Even if Steely's firm did "regularly appear as counsel in the cause," for purposes of imputation of notice to the client the death of Steely terminated the attorney-client relationship and the provisions of the Uniform Partnership Act (adopted in Texas) do not authorize the continuation of such an imputation.*

In Texas the death of a partner primarily handling a case for a client terminates the attorney-client relationship with the decedent and his firm! *Landa v. Shook,* 87 Tex. 608, 30 S.W. 536, 537 (1895); *Wright v. McCampbell,* 75 Tex. 645, 13 S.W. 293, 295 (1890). As the Texas Supreme Court said in *Landa*:

> "GAINES, C.J. We are of the opinion that the court did not err in charging the jury as stated in the question certified. *We are inclined to think that*

> *it was a matter of no importance whether, in employing the firm of Shook & Dittmar, Landa contracted specially for the professional services of Dittmar or not.* But, the services of Dittmar having been contracted for, when he died the performance of the contract was impossible; and this result was brought about without the fault of either party. The contract was at an end."

We are unable to comprehend the Court of Appeals' attempt to distinguish *Landa* upon the ground that the client in that case had "employed a particular member" of the firm in the teeth of the above italicized excerpt. (Appendix "B", page 6) Moreover, it was a fact, recognized by the Court of Appeals (Appendix "B", pages 2-3, "The file was assigned by said law firm to Mr. Steely to handle because of his *expertise* in aircraft litigation."), that *only* Steely handled or had any knowledge of the file at all material times.

The Court of Appeals also distinguished these Texas cases on the grounds that "the surviving partners are entitled to continue representing the client as long as he *consents* or *acquiesces* in their representation." (Appendix "B", page 6) This statement, perhaps more than any other pronouncement of the Court of Appeals, reflects that Court's (or panel) strong desire to emasculate the substantive rights of the Petitioners by resort to refined and technical casuistries. What is more, the statement is not even a true representation of the cases! In the *Wright* case the Texas Supreme Court held:

> "The pleadings and the evidence show that the employment of the firm of McCampbell & Givens was induced by the confidence reposed by defendant in the professional skill and fidelity of Givens, but that fact did not affect the interest of plaintiffs in

> the fee earned by him as a member of the firm, or impair their right to maintain an action, as surviving partners, for so much of it as had been earned at the time of his death. *The death of Givens dissolved the partnership, and terminated the employment.* McGill v. McGill, 2 Metc. (Ky.) 260. If the surviving members of the firm chose to perform the unfinished work, and the defendant had consented or acquiesced in their doing so, he would have thereby become bound to pay them, as surviving partners and in their own right, such compensation as the services were reasonably worth. *He had, however, the right to discontinue the employment of the surviving members of the firm after the death of Givens, and they had no right to insist on continuing their services because they had not been paid for previous services,* nor for any other reason contrary to the wishes of the defendant. Evidence was admitted of the performance of services by appellant after they had been notified of their discharge; but, as the court limited its judgment to compensation for such services as had been previously rendered, the evidence did not prejudice appellant, and the error of its admission was rendered immaterial."

The Court of Appeals, in tendering these unwarranted distinctions, wholly failed to mention two most important aspects of the matter.

First, at the time of the death there is no evidence that Mrs. Childers had "consented" to or "acquiesced" in the continued representation of her claim by the surviving partners. Exactly the contrary is true. Nothing had been or was being done with respect to the claim by the surviving firm at the time the "final denial" was mailed, and thus there was simply nothing for the claimant to which she could consent or acquiesce.

Second, and what is the most significant oversight by the intermediate Court, the question is not whether Mrs. Childers and her children ultimately consented or acquiesced in the subsequent representation, but whether, *at the crucial time of the mailing*, the surviving members of the firm had such an attorney-client relationship with the claimants as that notice to the law firm should be imputed to the claimants. There was no such relationship then existing; ergo, nothing could be imputed merely because of the *former* relationship.

Finally, the Court of Appeals reasoned that the provisions of the Texas Uniform Partnership Act (Appendix "D") relating to the effect of dissolution of partnerships "provides authority for the proposition that the partnership was qualified and authorized to receive notice on behalf of Mrs. Childers." (Appendix "B", page 7) The "provisions" referenced by this inaccurate statement have to do with the continuation of the firm for purposes of winding up its affairs, but have nothing whatsoever to do with the rule of law announced by the Texas Supreme Court in the *Landa* and *Wright* cases respecting the terminative effect of the death of the lawyer in a firm primarily handling the claim.

None of the "partnership" statutes purport to continue the relationship as regards the *right* of the surviving firm to continue to represent the former client. We suggest that the observations of the Court of Appeals are so wide of the mark as to preempt any further development. Perhaps the "surviving partners" can be bound in any number of ways by these "partnership" statutes in its dealings with third persons, but not so as to the client whose relationship has been terminated.

CONCLUSION

The double tragedy that has produced this admittedly "inequitable" result (the deaths of Messrs. Childers and Steely) has not been relieved of any of its consequences by the most technical and mechanistic approach of the Court of Appeals to a proper interpretation of the new time provisions of the Federal Tort Claims Act.

The statute is clear; section 2675(a) contemplates that notice of "final denial" shall be "sent" to the "claimant". The regulations relied upon by the Government (28 C.F.R. Part 14.9) should be accorded a construction similar to section 2675(a), or be declared an abusive exercise of administrative authority under the limitations imposed by 28 U.S.C.A. §2672, the only claimed authority for the regulation.

Finally, even if Petitioners be in error with respect to the above reasons, notice to a deceased lawyer, or his firm, is not imputable to the client under Texas law unless the client has, at or prior to the time of the notice, consented or acquiesced in the continued representation.

We are not unmindful of the burdens we labor under in seeking review by this overworked Court, but the holdings of the Court of Appeals have significant meaning in the future administration of the provisions of the Federal Tort Claims Act.

Wherefore, Petitioner prays this Honorable Court to grant this Petition and to reverse the Court of Appeals, and for other appropriate orders.

Respectfully submitted

W. JAMES KRONZER, JR.
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002
Attorney for Petitioners

CERTIFICATE

Three copies of the above and foregoing Petition for Writ of Certiorari have been deposited in the United States Mail with first class postage prepaid addressed to counsel of record at their post office addresses, and that as to the Solicitor General and Attorney General additional air mail postage has been prepaid. The Attorneys being served are:

Hon. John N. Mitchell (3 copies)
Attorney General of the United States
U.S. Department of Justice
Washington, D.C.

Hon. Erwin Griswold (3 copies)
Solicitor General of the United States
U.S. Department of Justice
Washington, D.C.

Hon. Anthony Farris (3 copies)
United States Attorney
Southern District of Texas
515 Rusk Avenue
Houston, Texas 77002

W. JAMES KRONZER, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. _____

CLARE DODGE CHILDERS, ET AL, *Petitioners*

versus

UNITED STATES OF AMERICA, *Respondent*

APPENDICES

APPENDIX "A"

(Opinion and Order of the District Court)

MEMORANDUM GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted)

Filed: July 8, 1970

Brown, Kronzer, Abraham, Watkins & Steely (W. W. Watkins, Esq.), Houston, Texas attorneys for Plaintiffs.

Anthony J. P. Farris, Esq., United States Attorney, and Rex R. Green, Esq., Assistant United States Attorney, Houston, Texas, attorneys for Defendant.

July 8, 1970

MEMORANDUM:

This is a tort claims action against the United States of America to recover for the death of Hal G. Childers. The defendant has filed a motion to dismiss, or alternatively for summary judgment, pleading the six month limitation period (following notice of denial of claim) under (b) of § 2401 of Title 28 U.S.C.A. The motion is well taken and will be granted. The facts, which are without dispute, are set out below in chronological order.

Mr. Childers' death occurred December 19, 1967, when the airplane which he was piloting, and which he had rented from Tarco Aviation, Inc., crashed in bad weather as he was undertaking to effect a landing near the Houston Airport.

Shortly thereafter the plaintiff here, his widow, on her own behalf and that of her and Mr. Childers' minor children, employed Charles W. Austin, Esq. to represent her and her children in seeking recovery for his death. At Mr. Austin's recommendation, the firm of Brown, Kronzer, Abraham, Watkins & Steely was associated with Mr. Austin in the representation. This firm is considered highly experienced and competent in the personal injury field, in general, and in aviation injury and death cases in particular. The arrangements for this representation were had between Mr. Austin and Mr. Kronzer of the named firm. The contract of employment reads, in part, that Mrs. Childers, for herself and as next friend of her minor children, "has employed Charles W. Austin and Brown, Kronzer, Abraham, Watkins & Steely as attorneys to prosecute and collect a certain claim held by the Client against Tarco Aviation, Inc., Piper Aircraft Company and all others legally responsible on account of the death of Hal G. Childers . . ." Thereafter, in due course and with the consent of the client, the file was assigned to Mr. Steely of that firm for handling.

Thereafter Mr. Steely filed suit against Tarco Aviation, Inc. in the state court and likewise filed claim with the Federal Aviation Administration on July 23, 1968.[1] Mr.

---

1. See Part 14 of 28 Code of Federal Regulations for administrative regulations under which such claim was filed, considered, and denied.

Steely and the office of the General Counsel of FAA exchanged a series of letters with regard to the claim during the next several months. At the request of FAA, Mr. Steely prepared and filed a "Statement of Authority" executed by Mrs. Childers reciting that she was the widow and mother of the minor children of Mr. Childers, as well as co-administrator of his estate. She stated, in part, "I have employed Mr. Charles W. Austin, Messrs. Brown, Kronzer, Abraham, Watkins and Steely and Robert L. Steely as attorneys to represent me in causes of action arising out of the death of my husband, Hal G. Childers. . . ."

On February 6, 1969, Mr. Steely was killed when his private aircraft crashed near Jacksonville, Florida. This accident was routinely investigated by investigators of the FAA stationed in Atlanta, Georgia. They, of course, had actual knowledge of Mr. Steely's death. There is nothing to indicate that the office of the General Counsel of FAA, or any employee of FAA considering the Childers' claim, had actual knowledge of the death of Mr. Steely. They were not advised by the firm.

On February 18, 1969, by letter addressed as follows:

"Robert L. Steely, Esquire
Brown, Kronzer, Abraham, Watkins
& Steely
500 Houston First Savings Building
711 Fannin Street
Houston, Texas 77002"

and sent "Certified Mail — Return Receipt Requested", the General Counsel of FAA denied the claim filed in that office July 23, 1968, and advised, in part, as follows:

> "You may, if you are dissatisfied with this determination, initiate action in an appropriate United States District Court, pursuant to the provisions of the Federal Tort Claims Act, Title 28 U.S.C., Section 1346(b) and 2672 et seq., not later than six months after the date of mailing of this notification."

This communication was received by the firm, and receipted for by the receptionist, using a rubber stamp for the firm's signature and her own signature as "Signature of addressee's agent, if any". What happened to this communication thereafter is somewhat uncertain. It is suggested in an affidavit of one of the attorneys of the firm, and it seems reasonable, that it was handed to the secretary who formerly had served Mr. Steely. At any event, it was placed in the "evidence" file of the case, this being an inconspicuous and probably an inappropriate portion of the file.

On or about February 20, 1969, the firm made distribution of Mr. Steely's cases to other firm members. The Childers case was assigned to Mr. W. W. Watkins. The denial letter never came to Mr. Watkins' attention — or apparently to the attention of any other attorney — until long thereafter.

This action was filed in this court November 13, 1969. The motion to dismiss was filed January 14, 1970. Mr. Watkins asserts by affidavit that he had no knowledge of the denial letter prior thereto.

Section 2401(b) of Title 28, U.S.C.A., reads as follows:

> "(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years

after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

The plaintiff contends that mailing of the denial letter is not sufficient; that receipt is required. It is argued further that Mr. Steely, not the firm, was the one to whom the notice was addressed; that because of his death some two weeks earlier he, of course, never received it; and is argued that the letter, addressed as it was, was not notice to the firm. It is argued further that Mr. Steely's death immediately dissolved the firm (a partnership); and thereafter notice could only be sent to the claimant.

These contentions, in my judgment, are unavailing. It is clear that it was not Mr. Steely alone who was authorized to represent Mrs. Childers in the matter but that it was Mr. Austin and the firm of which Mr. Steely was a member. In his several letters to the attorneys of the FAA, Mr. Steely invariably signed his correspondence, "Robert L. Steely, For the Firm."

As noted in the quotation of the statute above, the six month limitation period is defined as "within six months after the date of *mailing*." (Emphasis added.) Fortunately, we are not faced with the hard choice which would be presented in the event the statutory scheme for notice had failed, as if, for example, through loss or delay in the mail the notice had not been received in time, or perhaps not at all. Here, the scheme worked perfectly. The notice was received by the same individual to whose attention it would likely have come

had Mr. Steely been alive. The difficulty here simply lies in the fact that the receptionist and the secretary were not sufficiently alert to the importance of this certified letter, and its contents, to call same to the attention of a firm member; and the further fact that Mr. Watkins permitted five and one-half months to elapse after the file was assigned to him without making a complete examination of the file, and without making inquiry of the FAA as to the status of the claim.

Where, as in the Tort Claims Act, a sovereign waives its immunity, and by statute creates a cause of action and consents to be sued upon it, suits filed thereunder must be filed in exact compliance with the terms of consent. This is a condition precedent to suit. *Simon v. United States,* 244 F.2d 703 (5th Cir. 1957).[2] Provisions of state law which normally have the effect of tolling the statutes of limitation, such as minority, (*Simon v. United States,* supra), or the pendency of a workman's compensation claim [*Mendiola v. United States,* 401 F.2d 695 (5th Cir. 1968)] are not given that effect when the claim is under the Tort Claims Act. This being so, I suggest that the equitable considerations here involved likewise should not extend the statutory period. The "six month period following

2. Judge Hutcheson in this opinion quotes extensively from 34 Am. Jur. "Limitation of Actions," Sec. 7, reading in part as follows:

> "A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right." (At pp. 704-5.)

denial of claim by the administrative agency" provision of 2401(b) of Title 28 is entitled to the same strict construction as other limitation provisions, and is not to be extended by implication. *Claremont Aircraft, Inc. v. United States,* 420 F.2d 896 (9th Cir. 1970) and cases there cited.

The notice of denial of claim was in proper form. It was properly addressed and mailed. It was received by the firm, one of the entities authorized by the "Statement of Authority" filed pursuant to the Code of Federal Regulations to represent the plaintiff. The fact that it did not come to the attention of a person of discretion within the firm does not alter this fact. The action was not timely.

The motion for summary judgment is granted. Counsel for the defendant will prepare appropriate order, submit same to plaintiff's counsel for approval as to form, and forward to the Court for entry.

Done at Houston, Texas, this 8th day of July, 1970.

(Signed) BEN C. CONNALLY
United States District Judge

ORDER

(Number and Title Omitted)

Filed: July 16, 1970

The motion of the United States of America, defendant, to dismiss or in the alternative for summary judgment, pursuant to Rule 56(c) of the Rules of Civil Procedure, having been presented; and

Anthony J. P. Farris, United States Attorney, and Rex R. Green, Assistant United States Attorney appearing for defendant,

Brown, Kronzer, Abraham, Watkins & Steely and W. W. Watkins and W. James Kronzer appearing for plaintiffs; and

The Court having considered the pleadings, affidavits and exhibits of record, and the parties having filed several replies, memoranda of points and authorities in support and opposition to said motion, and being fully advised herein, prepared its Memorandum Opinion handed down July 8, 1970, finding that the defendant's motion to dismiss, or alternatively for summary judgment, pleading the six month limitation period under Section 2401(b) of Title 28, United States Code, to be well taken and should be granted.

It is therefore ORDERED, ADJUDGED and DECREED that the defendant's motion for summary judgment be, and the same is, hereby granted; and the plaintiffs' complaint be, and the same is, dismissed with prejudice, and that the defendant recover its costs and charges in this behalf expended and have execution therefor.

Done at Houston, Texas this the 16th day of July, 1970.

(Signed) BEN C. CONNALLY
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:

BROWN, KRONZER, ABRAHAM,
WATKINS & STEELY

(Signed) W. W. WATKINS
W. W. WATKINS

(Signed) W. JAMES KRONZER
W. JAMES KRONZER
Attorneys for Plaintiff

ANTHONY J. P. FARRIS
United States Attorney

(Signed) REX R. GREEN
REX R. GREEN
Assistant United States Attorney
Attorneys for Defendant

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30587

CLARE DODGE CHILDERS, ET AL.,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(May 10, 1971)

Before SKELTON*, Judge, and MORGAN and CLARK, Circuit Judges.

SKELTON, Judge: This is a tort claims action against the United States whereby plaintiff, Clare Dodge Childers seeks recovery for the alleged wrongful death of her husband, Hal G. Childers, which occurred on December 19, 1967, in a plane crash. The claim is predicated upon the

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* Honorable Byron G. Skelton, U. S. Court of Claims, Sitting by designation.

alleged negligence of employees of the Federal Aviation Administration (FAA). Plaintiff's claim was properly and timely presented to the FAA. Final denial of the claim was mailed to plaintiff's attorneys on February 18, 1969. More than six months subsequent to the mailing of the notice of denial, plaintiff instituted the present suit under the provisions of 28 U.S.C.A. §§1346(b) and 2671 through 2680, Federal Torts Claims Act. Defendant filed a motion to dismiss the complaint, pleading the six month limitation period (following notice of denial of claim) under section 2401(b) of Title 28 U.S.C.A. District Judge Connally granted the motion of the defendant in a memorandum handed down on July 8, 1970, and dismissed the case. We are in agreement with the result and reasoning of Judge Connally's decision.

The unusual set of circumstances which resulted in this appeal are as follows: Shortly after Mr. Childers' fatal crash, plaintiff, on her own behalf and that of her minor children, employed Charles W. Austin to represent her in seeking recovery for her husband's death. She further employed the firm of Brown, Kronzer, Abraham, Watkins & Steely at Mr. Austin's suggestion. The contract of employment reads, in part, that Mrs. Childers for herself and as next friend of her minor children "has employed Charles W. Austin and Brown, Kronzer, Abraham, Watkins & Steely as attorneys to prosecute and collect a certain claim held by the Client against Tarco Aviation, Inc., Piper Aircraft Company and all others legally responsible on account of the death of Hal G. Childers and said Attorneys are fully authorized to sue on said claim, prosecute the same to judgment, and to negotiate settlement thereof, * * *." The file was assigned by said law firm to

Mr. Steely to handle because of his expertise in aircraft litigation.

Thereafter, on July 23, 1968, Mr. Steely filed a claim with the FAA. Communications were exchanged, including a request by the FAA for a "Statement of Authority." Complying with this request, Mrs. Childers stated her authority to present the claim as the widow of Hal Childers and as the natural mother of his children. She further stated, "I have employed Mr. Charles W. Austin, Messrs. Brown, Kronzer, Abraham, Watkins and Steely and Robert L. Steely as attorneys to represent me in causes of action arising out of the death of my husband, * * *." Furthermore, it should be noted here that Mr. Steely always signed his correspondence with the FAA as "Robert L. Steely, For the Firm."

On February 6, 1969, Mr. Steely himself was killed when an airplane that he was piloting crashed. On February 18, 1969, approximately two weeks after his death, the FAA denied Mrs. Childers' tort claim by certified letter, return receipt requested, which letter in part stated:

> Robert L. Steely, Esquire
> Brown, Kronzer, Abraham,
> Watkins & Steely
>
> * * * *
>
> You may, if you are dissatisfied with this determination, initiate action in an appropriate United States District Court, pursuant to the provisions of the Federal Tort Claims Act, Title 28 U.S.C. Section 1346 (b) and 2672 et seq., not later than six months after the date of mailing of this notification.

As can be seen, the letter was addressed to both Mr. Steely and the firm. This denial letter was receipted for by the receptionist for the firm of Brown, Kronzer, Abraham, Watkins & Steely, and in the confusion following Mr. Steely's death, it was evidently placed in the "evidence" file without any member of the firm seeing it. The letter was not discovered until after the defendant's Motion to Dismiss in the present suit. Not realizing that the FAA had denied their claim, the firm filed suit out of caution, on November 13, 1969, before the expiration of two years from the date of the accident, but after the six month limitation period from the date of denial had run.

The applicable statute, section 2401(b) of Title 28 U.S.C.A. reads as follows:

> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Plaintiff argues that the above-quoted statute contemplates a two year statute of limitation if, to quote plaintiff, "the administrative claim has been presented within the two-year period and more than six months has expired since such presentation, but not more than two years have elapsed between the accident and the filing of the suit." The plain wording of the statute negates this contention as it says explicitly a tort claim against the United States is forever barred "unless action is begun within six months after the date of mailing * * * of notice of final denial."

This interpretation is in harmony with the Ninth Circuit case of *Claremont Aircraft, Inc. v. United States,* 9th Cir., 1970, 420 F.2d 896, which involved a situation similar to the instant case. The court there held that a suit instituted within two years from the date the claim accrued, but more than six months after the notice by registered mail of the denial of the claim was barred by section 2401(b), Title 28 U.S.C.A.

Thus, the primary issue before us is whether the notice of denial by the FAA was effective to start the six months statute of limitations running.

Plaintiff contends that it is mandatory that the notice of denial be sent to the claimant, and, therefore, notice to the claimant's attorney is insufficient. An examination of the applicable regulations illustrates that this assertion is without merit. Section 14.9 of Title 28 C.F.R. reads in part:

> "Final denial of an administrative claim *shall* be in writing and sent to the claimant, his attorney, *or* legal representative by certified or registered mail." [Emphasis supplied.]

This regulation is not in conflict with the Act nor any other regulation. It names explicitly the attorney as one of the people to whom the denial may be mailed. Furthermore, in *Claremont, supra,* the denial that began the six months limitation period was mailed to the claimant's attorneys.

Plaintiff's final contention is that the denial letter must be received by the addressee to be effective, as distinguished from being merely mailed, and that since plaintiff's attorney was dead, there was no receipt and thus

no effective notice to plaintiff's attorney and no imputation of notice to Mrs. Childers. In addition, plaintiff argues that Steely's death terminated the partnership as well as the partnership's right to represent Mrs. Childers.

We do not have to reach the question of whether receipt instead of mailing is intended by the statute, as we find that the partnership was authorized to receive the denial notice and did in fact receive it. That the partnership and the members thereof were counsel of record and authorized to represent Mrs. Childers is shown by the "Statement of Authority" quoted above. This is reinforced by the fact that Mr. Steely signed all his correspondence, "For the Firm." These facts, coupled with the contract of employment, conclusively show that the firm was counsel of record and authorized to represent Mrs. Childers.

Notwithstanding these circumstances, plaintiff lists three Texas cases decided previous to passage of the Texas Uniform Partnership Act, to support her argument that a partnership's right to represent a client terminates upon the death of one of the partners, citing *Landa v. Shook,* 87 Tex. 608, 30 S.W. 536 (1895); *Wright v. McCambell,* 75 Tex. 645, 13 S.W. 293 (1890); *Loden v. Fish,* 20 S.W.2d 208 (Amarillo 1929), (writ refused). These cases are distinguishable from the present situation in that the client in *Landa* and *Wright* employed a particular member of the firm and upon the death of that partner, the client specifically gave notice to the firm that he no longer desired their services. Even under the cases cited by plaintiff, the surviving partners are entitled to continue representing the client as long as he consents or acquiesces in their representation. It should also be noted that in *Wright,* the partnership could recover for services per-

formed after the death of a partner up until the time notice was given by the client that he no longer desired their services. In our present situation, there is no evidence that Mrs. Childers ever repudiated the partnership's continued representation of her with respect to said claim. In fact, it appears that the firm of Brown, Kronzer, Abraham, Watkins & Steely still represent her. *Loden v. Fish* is distinguishable in that it involved the death of the client.

Plaintiff also cites the Supreme Court case of *Trip v. Santa Rosa Street RR*, 144 U.S. 126, 12 S.Ct. 655, 36 L.Ed. 37 (1892), but that case is distinguishable because it states that notice to a deceased attorney's partner is not effective if the surviving partner was not counsel of record. Here the surviving partners were counsel of record.

Furthermore, the Texas Uniform Partnership Act, R.S. 6132b, effective January 1, 1962, provides authority for the proposition that the partnership was qualified and authorized to receive notice on behalf of Mrs. Childers. It provides that the dissolution of a partnership by the death of a partner is not equivalent to termination. Section 30 of said Act entitled "Partnership Not Terminated By Dissolution," provides:

> On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

The winding up of partnership affairs upon dissolution involves completing transactions begun but not then finished. Section 33 of the Act preserves the authority of any partner to act "* * * so far as may be necessary

to wind up partnership affairs *or to complete transactions begun but not then finished.* * * *" [Emphasis supplied.]

Section 35 of the Act binds the partnership as to third persons after dissolution "By any act appropriate for winding up partnership affairs or completing transactions *unfinished* at *dissolution;*" and further binds the partnership as to third persons "By *any* transaction which would bind the partnership of dissolution had not taken place, * * *" where the third person "* * * had known of the partnership prior to dissolution, and *having no knowledge or notice of* dissolution, * * *." [Emphasis supplied.]

The partnership here did not inform the FAA of Mr. Steely's death nor of any dissolution of the partnership.

We agree that equitable considerations here weigh heavily in favor of the plaintiff and her attorneys, but we conclude that the law and the facts are against them. The logic of the able district judge as expressed in his memorandum opinion is inescapable when he said:

> Where, as in the Tort Claims Act, a sovereign waives its immunity, and by statute creates a cause of action and consents to be sued upon it, suits filed thereunder must be filed in exact compliance with the terms of consent. This is a condition precedent to suit. *Simon v. United States,* 244 F.2d 703 (5th Cir. 1957). Provisions of state law which normally have the effect of tolling the statutes of limitation, such as minority, (*Simon v. United States,* supra), or the pendency of a workman's compensation claim [*Mendiola v. United States,* 401 F.2d 695 (5th Cir. 1968)] are not given that effect when the claim is under the Tort Claims Act. This being so, I suggest that the equitable considerations here involved likewise should not extend the statutory period. The

> "six month period following denial of claim by the administrative agency" provision of 2401(b) of Title 28 is entitled to the same strict construction as other limitation provisions, and is not to be extended by implication. *Claremont Aircraft, Inc. v. United States,* 420 F.2d 896 (9th Cir. 1970) and cases there cited.
>
> * * * *

It is our opinion that the notice of denial by the FAA was effective to start the six months limitation period running and, therefore, plaintiff's claim is barred.

We hold that the judgment of the district court granting the defendant's motion for summary judgment and dismissing plaintiff's case with prejudice was correct and should be affirmed, and it is accordingly

AFFIRMED.

APPENDIX "C"

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS LA. 70130
(504) 527-6514

May 10, 1971

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Re: No. 30587 - Childers, et al vs. U. S. A.

Gentlemen:

Enclosed is a copy of the Court's opinion this day rendered in the above case. *A judgment has this day been entered* in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure govern costs, petitions for rehearing and mandates, respectively.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By FRANCES WOLFF
Deputy Clerk

enc.

cc: Messrs. W. James Kronzer
W. W. Watkins
Messrs. James R. Gough
Rex. R. Green

APPENDIX "D"

(Texas Statutes)

Article 6132b, R.C.S.

§ 30. Partnership not Terminated by Dissolution

Sec. 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

§ 33. General Effect of Dissolution on Authority of Partner

Sec. 33. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership:

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where Section 34 so requires.

(2) With respect to persons not partners, as declared in Section 35.

§ 35. Power of Partner to Bind Partnership to Third Persons after Dissolution

Sec. 35. (1) After dissolution a partner can bind the partnership, except as provided in paragraph (3):

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction:

(I) Was a creditor of the partnership at the time of dissolution or had extended credit to the partnership within two years prior to dissolution and, in either case, had no knowledge or notice of his want of authority; or

(II) Though he was not such a creditor or had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under Paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution:

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution:

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who:

(I) Was a creditor of the partnership at the time of dissolution or had extended credit to the partnership within two years prior to dissolution and, in either case, had no knowledge or notice of his want of authority; or

(II) Though he was not such a creditor or had not so extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in Paragraph (1bII).

(4) Nothing in this Section shall affect the liability under Section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

BEST AVAILABLE COPY

APPENDIX "E"

Standard Form 95
Revised February 1965
Bureau of the Budget
Circular A-9 (Rev.)

SUBMIT TO:

CLAIM FOR DAMAGE OR INJURY

(Use additional sheets if necessary)

92-104

Use ink or typewriter. See reverse side for instructions and additional information required.

1. NAME OF CLAIMANT (Please print full name)	2. AGE	3. MARITAL STATUS	8. AMOUNT OF CLAIM
Mrs. Hal G. Childers	40	Widow	$1,200,000.00

4. ADDRESS OF CLAIMANT (Street, city, zone, State)
3000 Ella Lee, Houston, Texas

5. NAME AND ADDRESS OF SPOUSE, IF ANY
deceased

6. PLACE OF ACCIDENT (Give city or town and State; if outside city limits, indicate mileage or distance to nearest city or town)
Manvel, Texas

7. DATE AND DAY OF ACCIDENT: December 10, 1967
TIME (A.M. or P.M.): 3:47 p.m.

PROPERTY DAMAGE	$ - 0 -
PERSONAL INJURY	$ 1,200,000.00
TOTAL	$ 1,200,000.00

9. DESCRIPTION OF ACCIDENT—STATE BELOW, IN DETAIL, ALL KNOWN FACTS AND CIRCUMSTANCES ATTENDING THE DAMAGE OR INJURY, INDENTIFYING PERSONS AND PROPERTY INVOLVED AND THE CAUSE THEREOF

Deceased piloting Piper N6885P on IFR clearance with artificial horizon inoperative, was being radar vectored by Houston Approach Control, Federal Aviation Administration. Controllers were negligent in handling of this aircraft under these circumstances, so as to directly contribute to the fatal crash of N6885P and death of Hal Childers. Investigative materials and statements of NTSB referred to for further details.

10. PROPERTY DAMAGE

NAME OF OWNER, IF OTHER THAN CLAIMANT	ADDRESS OF OWNER, IF OTHER THAN CLAIMANT
Tarco Aviation Service, Inc.	9000 Randolph, Houston

BRIEFLY DESCRIBE KIND AND LOCATION OF PROPERTY AND NATURE AND EXTENT OF DAMAGE. SEE INSTRUCTIONS ON REVERSE SIDE FOR METHOD OF SUBSTANTIATING CLAIM

11. PERSONAL INJURY

STATE NATURE AND EXTENT OF INJURY WHICH FORMS THE BASIS OF THIS CLAIM

Hal Childers, husband and father of "Claimants" killed in crash of Piper N6885P on December 19, 1967, near Manvel, Texas, while operating aircraft IFR on radar vectors of Approach Control, William P. Hobby Airport.

12. WITNESSES

NAMES	ADDRESSES
See Attachment "A", incorporated by reference herein.	

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (*See 62 Stat. 698, 749; 18 U.S.C. 287, 1001.*)

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (*See R.S. §3490, 5438; 31 U.S.C. 231.*)

13. *I DECLARE UNDER THE PENALTIES OF PERJURY* THAT THE AMOUNT OF THIS CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE DESCRIBED. I AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

SIGNATURE OF CLAIMANT: Mrs. Hal G. Childers

DATE OF CLAIM: July 12, 1968

NOTE: Signature used above should be used in all future correspondence.

E2

NOTICE TO CLAIMANT

In order that your claim for damages may receive proper consideration you are requested to supply the information called for on both sides of this form. All material facts should be stated on this form, as it will be the basis of further action upon your claim. The instructions set forth below should be read carefully before the form is prepared.

INSTRUCTIONS

Claims for damage to or for loss or destruction of property, or for personal injury, must be signed by the owner of the property damaged or lost or the injured person. If, by reason of death, other disability or for reasons deemed satisfactory by the Government, the foregoing requirement cannot be fulfilled, the claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim, establishing authority to act.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 8 on this form. Separate claims for personal injury and property damage are not acceptable.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically reparable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

Any further instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated at the top of the other side of this form.

INSTRUCTIONS REGARDING INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle:

DO YOU CARRY COLLISION INSURANCE?	IF YES, GIVE NAME AND ADDRESS OF INSURANCE COMPANY AND POLICY NUMBER
☐ YES ☒ NO	

HAVE YOU FILED CLAIM ON YOUR INSURANCE CARRIER IN THIS INSTANCE, AND IF SO, IS IT FOR COVERAGE OR DEDUCTIBLE?	IF DEDUCTIBLE, STATE AMOUNT

IF SUCH CLAIM HAS BEEN FILED, WHAT ACTION HAS YOUR INSURER TAKEN, OR WHAT ACTION DOES IT PROPOSE TO TAKE WITH REFERENCE TO YOUR CLAIM? *(It is necessary that you ascertain these facts)*

This was rented aircraft, and these claimants have no ownership interest in the aircraft.

DO YOU CARRY PUBLIC LIABILITY AND PROPERTY DAMAGE COVERAGE?	IF YES, GIVE NAME OF INSURANCE CARRIER
Not applicable ☐ YES ☐ NO	

SIGNATURE OF CLAIMANT

[redacted]

U.S. GOVERNMENT PRINTING OFFICE: 1963—O-653283 (43-C

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APPENDIX "F"

STATEMENT OF AUTHORITY

My name is Mrs. Hal G. Childers. I am the surviving widow of Hal G. Childers, deceased, and I make this statement in response to a request of the Federal Aivation Administration as to the authority to present a claim as a result of the death of my husband, Hal G. Childers.

I am the surviving widow of Hal G. Childers, and I am the natural mother of the only children born of this marriage, Barbara Clare Childers and Patti Christine Childers. Both these children are minor children and are in my care and custody as their natural mother. I am the co-administrator of the estate of Hal G. Childers, deceased.

I have employed Mr. Charles W. Austin, Mssrs. Brown, Kronzer, Abraham, Watkins and Steely and Robert L. Steely as attorneys to represent me in causes of action arising out of the death of my husband, Hal G. Childers, and in accordance with the Federal Tort Claims Act I have agreed to a contingent fee arrangement.

No other person has charge, custody or control of my daughters, and in the presentation of this claim and the employment of the aforesaid attorneys I act on their behalf as their natural mother and natural guardian.

/s/ MRS. HAL G. CHILDERS

APPENDIX "G"

FEB. 18, 1969

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Robert L. Steely, Esquire
Brown, Kronzer, Abraham, Watkins & Steely
500 Houston First Savings Building
711 Fannin Street
Houston, Texas 77002

Re: Claim for Death of Hal Childers—
Aircraft Accident near Manvel, Texas
December 19, 1967

Dear Mr. Steely:

We have completed review of the claim *you* filed on July 23, 1968, with the Federal Aviation Administration on behalf of Mrs. Hal G. Childers and children for the death of her husband and father of the children.

Our review has not disclosed facts upon which a finding of liability on the part of this agency could be based. Accordingly, we must decline to make payment on the subject claim.

You may, if you are dissatisfied with this determination, initiate action in an appropriate United States District Court, pursuant to the provisions of the Federal Tort Claims Act, Title 28 U.S.C. Section 1346(b) and 2672 et seq., not later than six months after the date of mailing of this notification.

Sincerely yours,

CHARLES L. PETERS
for
NATHANIEL H. GOODRICH
General Counsel

cc: GC-42, (2), GC-40, Chron, GC-1,
AT-20, Hon. Ruckelshaus/DOJ
RCTait:mc:GC-42:2-12-69:x25307

APPENDIX "H"

(Also attached as Exhibit to Government's Motion to Dismiss)

Office of Honorable
William F. McKee
Department of Transportation
Federal Aviation Administration
Washington, D. C.

In Re: Mrs. Hal G. Childers and children vs. United States of America (fatal crash of Hal G. Childers on December 19, 1967)

Dear Sir:

Enclosed herewith you will find a completed standard form 95 on behalf of Mrs. Hal G. Childers and her children, the surviving beneficiaries of Hal G. Childers, who was fatally injured in the crash of Piper N6885P on December 19, 1967, while being vectored by Approach Control of Hobby Airport in Houston, Texas.

In order that no question may arise as to the presentation of this claim, a true copy of same is this day being forwarded to the Regional Office of the Federal Aviation Administration as addressed below.

If the government desires any information provided in Title 28, Section 14.4, the same is readily available and will be provided upon request by this writer.

We will appreciate your acknowledging receipt of this claim, and we remain

Very truly yours,
/s/ ROBERT L. STEELY
For the firm

RLS/bjb

cc: Mr. Hayes V. Hettinger
Federal Aviation Agency
8345 Telephone Road
Houston, Texas

APPENDIX "I"

690673

April 27, 1970

Honorable V. Bailey Thomas
United States District Clerk
P. O. Box 61010
515 Rusk Avenue
Houston, Texas 77061

Re: Clare Dodge Childers, et al v.
The United States of America,
Civil Action No. 69-H-1116,
USDC SD Texas.

Dear Sir:

Find enclosed duplicate originals of Defendant's Reply to Plaintiff's Reply to Defendant's Motion to Dismiss or, In the Alternative for Summary Judgment, and Supporting Memoranda, to be filed in the captioned cause.

Please indicate on a copy of this letter the date of filing and return the same to this office.

Yours very truly,

ANTHONY J. P. FARRIS
United States Attorney

By: REX R. GREEN
Rex R. Green
Assistant U. S. Attorney

RRG:mc

cc: John G. Laughlin, Esq., Chief, Torts Section, Civil Division, Department of Justice, Washington, D. C., 20530, Attn: H. L. Lyons

Federal Aviation Administration, Washington, D. C., Office of General Counsel, Attn: George H. Foster, Litigation Division

Federal Aviation Administration, P. O. Box 12638, Houston, Texas 77017, Attn: **HAYS HETTINGER, Esq. Area Counsel**